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In the Supreme Court of the United States

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
and the
DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

Brief of the Confederated Bands and Tribes
of
The Yakima Indian Nation

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INTEREST OF AMICUS CURIAE

The Yakima Indians, which now compose the Confederated Bands and Tribes of the Yakima Indian Nation, like the Puyallup Indians, have lived on lands and fished in rivers or streams that are in or border the State of Washington since time immemorial.

In 1855, under the treaty of Walla Walla, they ceded a large portion of their lands (16,920 square miles), reserving a small portion (1,875 square miles) for their exclusive use. As it had previously been necessary for existence that all the aboriginal area and its bounty be utilized they also reserved among other things "the right of taking fish at usual and accustomed places in common with the citizens of the territory."[1] This reservation is almost identical in wording to the provision of the Medicine Creek Treaty in issue.

The Confederated Bands and Tribes of the Yakima Indian Nation presently has 5,652 members. Approximately two-thirds of these members reside within the area ceded to the United States or reserved by the Yakima Nation. Many of these members are dependent upon the traditional Yakima fisheries for—or to supplement—their low standard of living. The Yakima Nation is a functioning sovereignty which regulates its members in their utilization of this tribal right at both on and off reservation fisheries as to time, place and method of fishing. The State of Washington by law and regulation totally prohibits any fishing by members

[1] 12 Stat. 951

utilizing their traditional methods at any of these fisheries. In the immediate past, and particularly in 1966, the State authorities embarked on an accelerated enforcement program which resulted in a multiplicity of arrests for violation of state fishing laws and regulations. Where Yakima members were abiding by tribal conservation regulations the Tribal Attorney of the Yakima Nation—and the United States Attorney—assumed their defense. Though the State of Washington was unsuccessful in any of these cases in obtaining convictions and failed, or did not attempt, to prove state regulation was reasonable or necessary, this harassment seriously limited the enjoyment of the members of the Yakima Nation in their exercise of the fishing rights reserved by treaty and consequently resulted in serious hardship to these members and their families. One of these cases, *State vs. James*, 72 Wn. 2d 738 (1967) reached the Washington State Supreme Court, which affirmed the decision of the trial court dismissing the State's Complaint. Since the State of Washington has taken no further action in said case, the Yakima Nation has no other way than by means of this case to bring its position to the attention of this court.

There has been some hope that there would be cooperation in the management of the Columbia River Fisheries. This hope has been destroyed by recent action of State fish management agencies. Governor Tom McCall of Oregon had asked that representatives of the

Indian tribes involved, representatives of the Secretary of the Interior and representatives of the State fish management agencies meet in council for the purpose of discussing the regulations of tribe, Secretary of Interior and the States to further conservation on the Columbia. In December it appeared that there was some hope that Indian treaty rights would be recognized, when Washington State officials announced that consideration would be given towards promulgating state regulations authorizing Indian fishing at usual and accustomed places. However, at the last meeting of the council on February 15, 1968, the hope of Governor McCall, the tribes and Federal agencies was destroyed by the position taken by the State fish management agencies. Fish management agencies of Washington and Idaho announced that they would await the decision of this court in this case before recognition of Indian treaty fishing rights. This position was then adopted by the Oregon Fish Commission and Governor McCall, who was chairman, adjourned the meeting in frustration until further call.

Therefore, though there has been no attack on the quality of the Yakima Nation's conservation regulations which are in effect and though the Secretary of the Interior has passed regulations covering Indian fishing on the Columbia, the State of Washington continues to refuse to recognize any Indian treaty right and by law and regulation totally prohibits Indian

treaty fishing by traditional methods anywhere on the Columbia River or in the State of Washington. It is therefore apparent that members of the Yakima Nation will continue to be arrested and harassed by the fish management agencies until a firm pronouncement covering Indian treaty rights is handed down by this court. The interest of the Yakima Nation in the outcome of this case follows as night follows day.

ARGUMENT

There have been many rules regarding Indian fishing at usual and accustomed places discussed in the briefs of petitioner and of The National Congress of American Indians as amicus curiae. Before discussing any of such rules, we ask their applicability in the present case. The question as to the State's power to regulate is not before us in the present case or situation. The injunction against petitioners is total and permanent and the State law and regulations also prohibit the taking of one fish by petitioners. This total prohibition against Indians takes place during a time when the fish run is extensively fished offshore and instream by fishermen not exercising Indian treaty rights. Assuming for argument that the State possesses the right to regulate, does this include the right to prohibit? The injunction as enlarged by State law and regulation provisions does not regulate, does not restrict, does not limit Indian treaty fishing. It totally prohibits the exercise of any Indian treaty fishing rights. The State of

Washington has perhaps disguised its long held contention that Indians do not have any rights that are not held by other citizens, but they are in fact before this court with a renewal of the same contention. This position was rejected by this court in *Tulee vs. Washington*, 315 U.S. 681 (1942). It cannot be claimed that total prohibition to fish at usual and accustomed places by the traditional methods was contemplated by the signers of the treaty. Fishing then, as now, was an integral part of the livelihood of the Northwest Indians. If there is to be a restriction on this treaty reservation, Congress should be the one in the exercise of its plenary power to break the United States' word with the Indian people. The states have been unable to sustain their contention regarding conservation before Congress and, therefore, turn to friendly state courts for such action under the guise of the reasonable and necessary rule and findings of fact within this broad pronouncement.

If Indian treaty rights are not to be destroyed in fact this court has two alternatives for its consideration. It can reaffirm that treaty Indians have a right to fish at usual and accustomed places by traditional methods subject only to the restriction that they take no more in amount or percentage of the run than they took at the time of the treaty or it can by guidelines provide what restrictions that are necessary for conservation that the State can impose. From the history of

the problem it is believed that the former alternative can be the only adequate answer. The responsibility would then be where it was at the time of the treaty, on the tribe reserving this right. This is surely what was contemplated by both parties to the treaty at the time of its execution. Nothing before this court in the present case could lead the court to believe that this right would be abused. If it is, Congress in exercising its duty to protect the nation's natural resources could break the treaty and impose any restraints necessary or could delegate this duty to the states for what action they considered necessary for conservation. Doubt that this would be done cannot exist in the minds of any objective observer.

If this court determines that the second alternative was within the contemplation of the makers of the treaty, the rule set forth by the Ninth Circuit Court in interpreting the *Tulee* case in *Maison vs. Confederated Tribes of the Umatilla Reservation*, 314 F.2d 169 (C.A. 9th 1963) most closely follows the intent of the treaty makers and the decisions of this court. In *Tulee* this court after setting forth that state regulation must be "necessary" said:

> ". . . the imposition of license fees is not *indispensable* to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." (Italics ours)

In the holding below the State courts while agreeing

that regulations must be "reasonable and necessary" chose to reject without adequate reason the use of the word "indispensable." This was true even though the *Tulee* decision had used both words in the same light. We cannot understand the rejection of this *indispensable* guideline while accepting the *necessary* guideline. Doesn't "necessary" mean "indispensable"? Lexicographers find the words interchangeable.

The holding of the Supreme Court in this interpretation of a federal treaty is binding on the State courts and the interpretations of the Ninth Circuit Court is entitled to great weight. In spite of this uniform rule, the Washington State Courts have rejected the indispensable test laid down in *Maison vs. Umatilla* without any good reason. This should be corrected.

While we would agree with petitioners that action in State court cannot be brought against a tribe without its consent, we are concerned that the court in its decision may indicate that criminal action to enforce state regulation, without some prior finding by the courts that the regulation is necessary and indispensable, is the proper remedy. This is not so. There are two fundamental principles of criminal law that are applicable in the United States. One is that criminal laws must be certain. Before the State can punish a person for a crime, the law to which that individual is subject must be clear and unmistakable. The person must know, or at least be able to know, before he com-

mits an act whether the act is a crime or not. If it is too vague, then that statute cannot stand. This court has expressed itself on this point in *Connolly vs. General Construction Company*, 269 U.S. 385 (1926), where it said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The State of Washington has handled the question of regulation of Indian fishing in terms that are too vague to provide due process. The State, without any hearing, laws or regulations specifically regarding Indian treaty fishing, and with only the general guideline that treaty Indians are subject to State law the same as every other citizen, has in the past brought many criminal actions claiming that it is necessary to conservation to bring Indians at usual and accustomed places in each particular instance within the purview of its general law or regulation. You can readily see the problem confronting the individual Indian fisherman. He runs the chance that the tryer of fact will determine that the State's regulation is necessary—when only last year the tryer of fact may have found just the opposite regarding the same Indian at the same location.

In 1966 a situation existed where tribal governing bodies had enacted tribal conservation regulations that were found to be adequate by the Department of the

Interior and Department of Justice, and where tribal authorities and the United States Government had announced their intent to defend every Indian fishing in conformity with the regulations, that the State still arrested many Indians so fishing and subjected them to unsuccessful criminal prosecution. Perhaps injunctive procedure is not applicable, but it is submitted that criminal prosecution under the facts involved is even less applicable.

CONCLUSION

This court again has before it unreasonable and arbitrary action on the part of a third party—not party to a treaty or promise—to pervert and destroy the intention these two parties did and still have regarding said reserved right. The Yakima Indian Nation has every confidence that this court will not be participant in such improper action. The Executive Branch of the Federal government and Congress has in spite of pressure from the states tried to keep their word in this fishing matter. "Great countries like great men keep their word."

Respectfully submitted,

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March 1, 1968